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Jason Bradley Kay

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The Post-*Green Tree* Evidentiary Standard for Invalidating Arbitration Clauses in Consumer Lending Contracts: How Much Justice Can You Afford?

I. INTRODUCTION

Among the liberties secured by the Constitution is the right to have suits at common law decided by a jury.¹ The enactment of the Federal Arbitration Act² (FAA) in 1925 produced a critical qualification to this right, allowing commercial entities to agree to resolve a contractual dispute through binding arbitration agreements.³ In *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court announced that, for consumers, the right to a trial by jury had been further qualified.⁴ Even where the costs of arbitration are potentially so high as to preclude the consumer from vindicating her statutory rights, a contractual

1. See U.S. CONST. amend. VII (stating that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

2. Congress originally enacted the FAA in 1925 to encourage the resolution of private disputes in a private arbitral forum. See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1004 (1996). Congress reenacted the FAA in 1947 as 9 U.S.C. §§ 1-15 (1947). Section 2 of the FAA provides that arbitration clauses are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2000). Section 3 further allows the party seeking enforcement to obtain a stay or an order compelling arbitration if the opposing party refuses. 9 U.S.C. § 3 (2000). Courts were initially reluctant to enforce these sections of the FAA when arbitration clauses were used in “public interest” areas such as employment discrimination, antitrust, and securities. Ware, *Arbitration and Unconscionability*, *supra*, at 1004. But the Supreme Court later ruled that arbitration agreements must be enforced regardless of the contractual area because the agreements were basic contractual provisions and, therefore, generally applicable. *Id.* at 1005. Since that time, courts generally have enforced arbitration clauses when they appear in any contract. See, e.g., *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

3. 9 U.S.C. § 2 (2000).

4. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (holding that a standard, non-negotiable consumer loan agreement containing an arbitration clause was enforceable against the consumer, despite its silence as to the apportionment of arbitration fees) [hereinafter *Green Tree III*].

agreement to arbitration, even in an adhesion contract, is still enforceable.⁵ The Court required that when “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”⁶ In announcing this standard, the Court left open the possibility that an arbitration clause could be invalidated because of inordinately high arbitration costs for the consumer.⁷ What evidence is necessary to show such prohibitive costs, however, was left provocatively unspecified.⁸

This Note begins with an exploration of the procedural history and holding of the Supreme Court’s decision in *Green Tree*.⁹ The next section of the Note discusses the legal and policy considerations serving as a foundation to the *Green Tree* decision.¹⁰ The Note then identifies and analyzes the emerging evidentiary standard for what constitutes a showing of prohibitive costs,¹¹ followed by a discussion of the implications of the emerging evidentiary standard for lenders and consumers.¹² The Note concludes that although the *Green Tree III* holding significantly strengthens the enforceability of arbitration clauses, lenders must beware that arbitration clauses imposing unduly burdensome costs on consumers may yet be invalidated.¹³

II. STATEMENT OF THE CASE

At issue in *Green Tree III* was whether an arbitration clause contained within a consumer loan agreement was enforceable despite the clause’s silence as to the apportionment of potentially substantial arbitration costs incurred in vindicating a

5. *Id.* at 79 (“the ‘risk’ that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify invalidation of an arbitration agreement”).

6. *Id.* at 92.

7. *Id.* at 91 (“It may well be that the existence of large arbitration costs could preclude a litigant such as [the plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum.”).

8. *Id.* at 71.

9. See *infra* notes 14-71 and accompanying text.

10. See *infra* notes 72-127 and accompanying text.

11. See *infra* notes 128-62 and accompanying text.

12. See *infra* notes 163-88 and accompanying text.

13. See *infra* notes 189-200 and accompanying text.

federal statutory claim in an arbitral forum.¹⁴ Larketta Randolph bought a mobile home financed through defendant Green Tree Financial Corporation.¹⁵ The loan agreement contained a clause requiring her to forgo litigating a claim against Green Tree and binding her to resolve any potential disputes through arbitration.¹⁶ Upon Randolph's alleged discovery of Green Tree's failure to disclose a finance charge required by the Truth in Lending Act (TILA),¹⁷ and for violating the Equal Credit Opportunity Act (ECOA) by requiring her to arbitrate her statutory cause of action under TILA,¹⁸ Randolph filed suit in federal court.¹⁹ Green Tree moved to compel arbitration.²⁰

14. *Green Tree III*, 531 U.S. at 89.

15. *Id.* at 82.

16. *Id.* at 83 n.1. The arbitration agreement stated:

All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract.

Id.

17. 15 U.S.C. § 1601(a) (2000). Randolph claimed that Green Tree violated TILA by failing to disclose in the contract the "vendors single interest" insurance charge of \$15.00 annually. *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1415 (M.D. Ala. 1997) [hereinafter *Green Tree I*].

18. 15 U.S.C. § 1691 (2000). Section 1691 provides that "(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . (3) because the applicant has in good faith exercised any right under this chapter." § 1691(a)(3). Randolph claimed that Green Tree violated the

A. *District Court—Green Tree I*

In analyzing Green Tree's motion to compel arbitration, the district court first addressed whether enforcement of the arbitration clause was statutorily barred.²¹ Second, the court addressed the contractual claims by considering whether the arbitration provision was supported by valid consideration and whether the plaintiff knowingly consented to arbitration.²²

The court applied a two-prong test to evaluate whether the arbitration provision was statutorily barred: (1) whether the arbitration agreement was broad enough to encompass the plaintiff's statutory claims; and (2) "whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims."²³ Under the first prong, the plaintiff argued that the arbitration provision failed specifically to mention the relevant statutes, and therefore did not encompass her statutory claims.²⁴ The court found, notwithstanding her argument, that the arbitration clause was sufficiently broad.²⁵ Under the second prong, the court noted that the plaintiff faced a rebuttable presumption in favor of enforcing the arbitration provision.²⁶ To rebut this presumption, the plaintiff was required (1) to demonstrate that Congress intended to preclude waiver of judicial remedies for TILA or ECOA rights at issue (2) by showing that text or legislative history of the statutes indicated such a preclusive intention, or (3) that there was an inherent conflict between

ECOA by requiring her through the arbitration agreement to waive her statutory cause of action under TILA. See *Green Tree I*, 991 F. Supp. at 1413.

19. *Green Tree III*, 531 U.S. at 83.

20. *Id.*

21. *Green Tree I*, 991 F. Supp. at 1415.

22. *Id.* at 1421-23.

23. *Id.* at 1416.

24. *Id.*

25. *Id.* (In light of the language of the arbitration provision providing "[a]ll disputes, claims or controversies arising from or relating to this Contract," the court found "the terms of the provision to be sufficiently broad to encompass Plaintiff's TILA, ECOA, and other claims in this suit, notwithstanding Plaintiffs' protestations that the provision does not specifically reference applicable statutes").

26. *Id.* at 1414 ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

permitting arbitration and the purpose of the statutes.²⁷ The court found that the plaintiff failed to demonstrate through these means that Congress intended to preclude waiver, and thus held that arbitration was not statutorily barred.²⁸

Addressing the plaintiff's contractual claims, the court examined whether the arbitration provision was supported by adequate consideration and whether the plaintiff consented to arbitration.²⁹ Plaintiff argued that the clause was unenforceable because, although the plaintiff was required to arbitrate all claims against the defendant, the defendant was permitted to choose between resolving its claims against the plaintiff by arbitration or trial.³⁰ In finding that consideration was adequate, the court considered dispositive an applicable Alabama law which did not require mutuality of consideration.³¹ The court then found that the plaintiff gave adequate consent to the arbitration provision and noted that her failure to read the agreement before signing did not make the agreement unenforceable.³² Thus, the court held that the arbitration provision was supported by adequate consideration, which coupled with the plaintiff's consent to render the agreement enforceable.³³

27. *Green Tree I*, 991 F. Supp. at 1417.

28. *Id.* at 1420.

29. *Id.* at 1420-21.

30. *Id.*

31. *Id.* at 1422. Randolph claimed that since the consumer was required to arbitrate everything, and Green Tree was not required to arbitrate anything, the contract was void for lack of mutuality of obligation. *Id.* at 1421. The Court, however, disagreed saying,

Under Alabama law, mutuality: "[D]oes not mean equal rights under the contract, or that each party is entitled to the same rights or covenants under the contract. So long as there is a valuable consideration moving from one side to the other, or there are binding promises on the part of each party to the other, there is adequate consideration for a valid contract."

Green Tree I, 991 F. Supp. at 1421 (quoting *Marcrum v. Embry*, 282 So. 2d 49 (1973)).

32. *Id.* at 1423.

33. *Id.* at 1420-21.

The court dismissed the plaintiff's suit with prejudice and compelled her to submit her claims to binding arbitration.³⁴ Later, the court denied the plaintiff's motion for reconsideration.³⁵

B. Eleventh Circuit—Green Tree II

Randolph appealed the district court's decision to the Eleventh Circuit,³⁶ contending that the arbitration clause was enforceable.³⁷

In evaluating whether TILA precluded the enforcement of the arbitration provision, the court noted at the outset of its analysis that there was a strong federal policy in favor of enforcing arbitration provisions.³⁸ Despite this strong policy, the court emphasized that procedural flaws, such as hefty arbitration costs and "steep filing fees," could so burden a plaintiff as to prevent her from exercising her statutory rights.³⁹ In such cases, the court will not reach the question of whether TILA precludes enforcement of the arbitration provision.⁴⁰ Rather, the arbitration provision will not be enforced when it fails to provide "minimum guarantees"

34. *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1424-25 (M.D. Ala. 1997).

35. *Id.* at 1425-26.

36. *Randolph v. Green Tree Fin. Corp.-Alabama*, 178 F.3d 1149, 1152 (11th Cir. 1999) [hereinafter *Green Tree II*].

37. *Id.* at 1158. Before addressing the enforceability of the arbitration provision, the court considered Green Tree's argument that the decision of the district court was not appealable because it was not a "final decision." *Id.* at 1153. Green Tree argued that the court should adopt a distinction validated by other Circuit Courts of Appeal between "embedded" and "independent" proceedings. *Id.* Embedded proceedings are those where the motion to compel arbitration is one issue among others in a broader action. *Id.* Embedded proceedings are treated as interlocutory and are non-appealable. *Id.* Independent proceedings are those where the motion to compel arbitration is the only issue before the court. *Green Tree II*, 178 F.3d at 1153. A decision in an independent proceeding is appealable as a "final" decision. Although the court recognized that some circuits had adopted the embedded/independent distinction, this distinction was not adopted by the Eleventh Circuit. *Id.* at 1153-54. The court instead held that any decision which effectively disposed of all issues framed by the litigation and left nothing for the court to do but execute the judgment, was a final decision which could be appealed. *Id.* at 1155-57. On this basis, the court held that it did have jurisdiction to hear Randolph's appeal. *See id.* at 1153-57.

38. *Id.* at 1157.

39. *Id.*

40. *Green Tree II*, 178 F.3d at 1159.

that the plaintiff's rights can be vindicated without imposing burdensome costs.⁴¹ The court noted several features present in the Green Tree arbitration clause which presented the potential for such burdensome costs to the litigant: (1) the clause was silent about the payment of filing fees and costs of arbitration; (2) there was no provision for waiver of costs in cases of financial hardship; (3) no mention was made as to whether consumers, if they prevailed, would be saddled with fees and costs in excess of the award; and (4) the clause did not specify what, if any, rules would guide the arbitration process.⁴² On these grounds, the court held that "the arbitration clause in this case is unenforceable, because it fails to provide the *minimum guarantees* required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."⁴³

The Eleventh Circuit reversed the district court and held that the arbitration provision was unenforceable.⁴⁴ Because the court decided the case on the "minimum guarantees" issue, it did not reach the question of whether TILA precluded all arbitration agreements.⁴⁵

C. *United States Supreme Court—Green Tree III*

On December 11, 2000, the Supreme Court, by a five to four vote, affirmed in part and reversed in part the ruling of the Eleventh Circuit.⁴⁶ The Court, affirmed the Eleventh Circuit's holding that a dismissal with prejudice related to granting a motion to compel arbitration was an appealable "final decision."⁴⁷ The Court reversed the Eleventh Circuit's determination that the arbitration provision was unenforceable because it failed to protect affirmatively a party from potentially steep arbitration costs.⁴⁸

41. *Id.* at 1157.

42. *Id.* at 1158.

43. *Id.* (emphasis added).

44. *Id.* at 1159.

45. *Id.*

46. *Green Tree III*, 531 U.S. 79, 82 (2000).

47. *Id.*

48. *Id.* at 90.

After citing the strong federal policy in favor of enforcing arbitration provisions,⁴⁹ the Court stated that it had in the past rejected “generalized attacks on arbitration that rest[ed] on ‘suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.’”⁵⁰ The Court then held that a two-step analysis was applicable to the instant case.⁵¹ First, the Court considered whether the parties agreed to submit their claims to arbitration.⁵² Second, the Court considered whether Congress had “evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”⁵³ The Court found that neither prong was at issue on appeal since it was undisputed that the parties agreed to arbitrate all claims related to the contract, including claims involving statutory rights, and Randolph did not contend that TILA evinced an intention to preclude a waiver of judicial remedies.⁵⁴

The substance of the plaintiff’s argument was, therefore, not pointed toward either of the applicable prongs: the plaintiff instead argued that the arbitration agreement’s silence, with respect to costs and fees, created a risk of incurring prohibitive arbitration expenses, leaving her unable to vindicate her statutory rights in the arbitral forum.⁵⁵ The Court rejected this argument saying potentially prohibitive costs were not enough to invalidate the arbitration provision.⁵⁶ “The record reveals only the arbitration agreement’s silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The ‘risk’ that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”⁵⁷ The Court held that where a party seeks to invalidate an arbitration agreement because of potentially prohibitive costs, that party “bears the burden of showing the likelihood of incurring such

49. *Id.* at 89.

50. *Id.* at 90 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

51. *Id.*

52. *Green Tree III*, 531 U.S. 79, 90 (2000).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 91.

57. *Id.*

costs.”⁵⁸ The case was remanded to the Eleventh Circuit for further proceedings consistent with the Supreme Court’s holding.⁵⁹

The Supreme Court took special note that the existence of large arbitration costs that could create a *likelihood* that a litigant would be precluded from effectively vindicating her federal statutory rights might render an arbitration agreement unenforceable.⁶⁰ This “likelihood” standard,⁶¹ however, did not permit Randolph to make such a showing in the instant case.⁶² Randolph submitted evidence to the district Court of the American Arbitration Association’s (AAA) minimum filing fees,⁶³ a newspaper article quoting an AAA executive as to the average costs of arbitration,⁶⁴ and a list of fees incurred in cases involving other arbitrations.⁶⁵ Nevertheless, the Court found this evidence

58. *Green Tree III*, 531 U.S. 79, 91-92 (2000).

59. *Id.* On remand, the plaintiff did not attempt to present evidence that there was a “likelihood” that she would incur costs prohibiting her from vindicating her statutory rights. See *Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 817 (11th Cir. 2001) [hereinafter *Green Tree IV*]. Rather, the plaintiff claimed that the arbitration provision precluded her from vindicating her statutory rights to bring a class action suit under TILA. *Id.*; see also 15 U.S.C. § 1640 (2000) (TILA caps the statutory damages available in a TILA class action). Although the court acknowledged that the text of TILA specifically contemplates class actions, the court found a distinction between having access to a litigation tool and having the right to exercise it:

‘[W]e recognize, of course, that a class action is an available, important means of remedying violations of the TILA. However, there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstance. . . . An intent to create such a ‘blanket right,’ a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the TILA.’

Green Tree IV, 244 F.3d at 817 (quoting *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1337-38 (11th Cir. 2000)) (citations omitted). Accordingly, the court held that Randolph did not “carry her burden of showing either that Congress intended to create a non-waivable right to bring TILA claims in the form of a class action, or that arbitration was ‘inherently inconsistent’ with the TILA enforcement scheme.” *Green Tree IV*, 244 F.3d at 817-18.

60. *Green Tree III*, 531 U.S. at 90.

61. See *infra* notes 155-62 and accompanying text.

62. *Green Tree III*, 531 U.S. at 90.

63. *Id.* at 91 n.6 (indicating that the filing fee for the AAA was \$500 for a claim under \$10,000).

64. *Id.* (indicating that the average arbitral fee is \$700 per day).

65. *Id.*

provided “no basis on which to ascertain the actual costs and fees to which Randolph would be subject in arbitration.”⁶⁶

Justice Ginsburg dissented on the ground that the majority opinion required a plaintiff “either to submit to arbitration without knowing who [would] pay for the forum or to demonstrate up front that the costs, if imposed on the plaintiff, [would] be prohibitive.”⁶⁷ Ginsburg’s dissent argued that the majority opinion blended two discrete inquiries: the adequacy of the arbitral forum to adjudicate the claims at issue and the accessibility of the arbitral forum to the party resisting arbitration.⁶⁸ Ginsburg argued that although it may be proper to assign the burden of proof to the party resisting arbitration with regard to the first inquiry,⁶⁹ the Court should not require the resisting party to establish that its access to the arbitral forum would be prohibited.⁷⁰ Since, in Ginsburg’s opinion, the Court must determine whether the forum is accessible before it can determine whether it is adequate, the majority “reached out prematurely to resolve the matter in the lender’s favor.”⁷¹

III. BACKGROUND LAW

A. *The FAA—History and Purpose*

Arbitration has been used to resolve disputes at least since the time of ancient Greece when “wise men” would travel the land and settle disputes for a fee.⁷² In medieval times, arbitration was primarily used to resolve disputes arising in the business context.⁷³ Similarly, the United States Congress passed the FAA⁷⁴ in 1925, at

66. *Id.*

67. *Id.* at 93 (Ginsburg, J., dissenting).

68. *Green Tree III*, 531 U.S. at 93 (Ginsburg, J., dissenting).

69. *Id.* (Ginsburg, J., dissenting).

70. *See id.* at 93-94 (Ginsburg, J., dissenting).

71. *Id.* at 96 (Ginsburg, J., dissenting).

72. Preston Douglas Wigner, Comment, *The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

73. *Id.* at 1502.

74. 9 U.S.C. §§ 1-16 (2000).

least in part, in an attempt to provide an efficient method for businesses to settle disputes among themselves.⁷⁵

Initially, arbitration agreements subject to the FAA were presumed to be the product of arms-length negotiations between parties with relatively equal bargaining power.⁷⁶ The passage of the FAA was intended to lend formal credence to arbitration clauses in commercial contracts⁷⁷ and to relieve the judicial hostility toward such clauses.⁷⁸ Section 2 of the FAA provides that arbitration provisions are valid, irrevocable, and enforceable and can be invalidated only upon such grounds as exist at law or equity for the revocation of any contract.⁷⁹ On the basis of the FAA and the supporting legislative history, the Supreme Court has recognized that there is a "strong federal policy favoring arbitration."⁸⁰

75. See Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1191 (2001) ("[A]rbitration was initially created so that parties, with equal bargaining power, could reduce the costs of litigation."); see also Emily Madoff, *Arbitration Clauses Lethal to Class Actions, Consumer Contract Terms Insulate Businesses From Courts*, N.Y.L.J., Aug. 13, 2001, at s3 (explaining arbitration clauses originally "meant to be negotiated between relatively sophisticated parties with equal bargaining power").

76. See Madoff, *supra* note 75, at s3.

77. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (FAA intended to "place arbitration agreements upon the same footing as other contracts").

78. See *id.* (purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts"); see also, Smith, *supra* note 75, at 1191 (noting that judicial hostility toward arbitration clauses carried over from England to the United States).

79. 9 U.S.C. § 2 (2000) ("[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

80. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); see also *Paladino v. Aynet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (citing a "strong federal policy favoring arbitration").

B. Public Policy Arguments

Behind the “strong federal policy”⁸¹ favoring arbitration lurks an equally strong and unsettled policy debate.⁸² Proponents of arbitration laud it as a method to cut costs of doing business and pass the savings to consumers.⁸³ Opponents decry it as a means to abuse consumers.⁸⁴ In the midst of this debate, the Supreme Court has stated that it will not invalidate arbitration agreements merely on the basis of “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.”⁸⁵ But the courts must continue to decide the validity of consumer arbitration clauses in an atmosphere of vigorous policy debate.⁸⁶

1. The Arbitration Advocates

Proponents of arbitration advance simple but compelling arguments. Arbitration advocates point out that, despite speculation about bias, consumers fair better in arbitration proceedings than in court.⁸⁷ Studies indicate that in federal court, corporations prevail eighty-seven percent of the time in suits against individuals, while in arbitration administered by the National Arbitration Forum (NAF), corporations prevailed only sixty-three percent of the time.⁸⁸ A separate study indicated that

81. See *Green Tree I*, 991 F. Supp. 1410, 1414 (M.D. Ala. 1997); see also *supra* note 26 and accompanying text.

82. See generally Smith, *supra* note 75, at 1220-23; Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry is Deciding for You*, 2001 J. DISP. RESOL. 101, 116-18 (2001), WL 2001 JDR 101.

83. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90-91 (2001) (noting the argument that arbitration cuts litigation costs, decreases awards, and passes the savings on to consumers), WL 2001JDR89.

84. See Smith, *supra* note 75, at 1220-22 (noting the ways in which arbitration agreements are used by corporations to abuse consumers).

85. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

86. See *infra* notes 87-127 and accompanying text.

87. See Kristen Porter, Comment, *Upholding Precedent: How The U.S. Supreme Court Should Approach The Green Tree Circuit Split*, 26 WM. MITCHELL L. REV. 1075, 1077-78 (2000) (discussing the myth that arbitration produces higher win rates for corporations than do trials).

88. See Porter, *supra* note 87, at 1077.

over ninety percent of participants in arbitration believed their cases were handled fairly.⁸⁹

Lending more credence to the arguments of arbitration advocates is the comparative speed of, and strong public preference for, adjudicating disputes in an arbitral forum.⁹⁰ For example, a typical consumer dispute can be resolved in approximately half the time of litigation.⁹¹ Indeed, arbitration is largely aimed at avoiding this drawback to litigating in the judicial system.⁹² There is also a strong public preference for arbitration.⁹³ One study indicated that fifty-nine percent of Americans would choose arbitration over litigation.⁹⁴ When the subjects of that study were informed that arbitration could cost up to seventy-five percent less, eighty-two percent favored arbitration.⁹⁵

2. The Arbitration Opposition

As a foundational matter, critics of arbitration observe that it strips would-be litigants of the procedural and substantive rights granted to every citizen by the judicial system.⁹⁶ Among the more notable rights that are commonly lost to arbitration are the right

89. See Eric J. Mogilnicki, *High Court's Arbitration Ruling A Boon to Consumer*, *BANKS*, AM. BANKER, Dec. 22, 2000, at 12.

90. See Porter, *supra* note 87, at 1077-78.

91. See Mogilnicki, *supra* note 89.

92. Former President George H.W. Bush once observed:

[M]ost good lawyers know that the civil justice system is out of control. In the past 20 years the number of civil lawsuits filed in federal court has more than doubled and today the average case takes almost a year to be resolved. In the past year alone, the number of cases pending for up to three years increased by nearly 15%. That means you can file a suit, have time to enroll in law school, study three years, graduate, pass the bar and then represent yourself in the court the day the judgment is handed down.

Matthew C. Bouchard, Note, *Randolph v. Green Tree Financial Corp.: Are Consumer Arbitration Agreements That Are Silent As To The Apportionment of Arbitral Expenses Enforceable?*, 4 N.C. BANKING INST. 319, 319 n.1 (2000) (quoting, *Why ADR?*, *Dispute Resolution Alternatives Supercourse* 485, 486 (Ellis R. Mirsky chmn., 1993)).

93. See Porter, *supra* note 87, at 1101.

94. *Id.*

95. See *id.*

96. See Samuel Estreicher and Kenneth J. Turnbull, *Pre-Dispute Employment Arbitration Agreements: Who Pays?*, N.Y.L.J., May 30, 2001, at 3.

to: a jury trial; a public forum for litigation; have the public bear the cost of litigation; have a written record of the litigation; have litigation proceedings and results be subject to appellate review; discovery; present all relevant evidence; bind the arbitral forum to legal precedent; and bring class action suits.⁹⁷ With the tremendous disparity in bargaining power between consumers and corporations, arbitration provisions drafted by corporations put even the consumer's *method* of asserting his rights at the mercy of the corporation's terms.⁹⁸

This discrepancy in bargaining power has lead critics to question the institutional neutrality of arbitration services.⁹⁹ Two prominent arbitration services, the Judicial Arbitration and Mediation Service (JAMS)¹⁰⁰ and the NAF,¹⁰¹ operate on a for-

97. See *id.* The loss of the right to bring class action suits in the arbitral forum was further solidified in the *Green Tree* remand to the Eleventh Circuit. *Green Tree IV*, 244 F.3d 814, 817-18. This decision further disabled the plaintiff from utilizing a litigation tool whereby the plaintiff, through raising a case on a contingency fee basis, could bring a claim without incurring prohibitive costs. See generally Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-9 (2000).

[D]efense counsel and other arbitration advocates readily observe that arbitration can be used to deter the filing of a class action suit, or secure dismissal of a class action that was nonetheless brought. The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable.

Id. at 8-9 (citations omitted).

98. Smith, *supra* note 75, at 1220-21 (arguing that consumers who have no choice but to submit to arbitration clauses, are involuntarily stripped of rights beneficial to consumers).

99. See Carrie Menkel-Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 38-57 (1999).

100. JAMS provides alternative dispute resolution services, claiming a resolution success rate of ninety percent. See *About JAMS*, at http://www.jamsadr.com/who_we_are.asp (last visited, Feb. 23, 2002). JAMS also explicitly encourages organizations to customize the rules and procedures of the arbitration process. JUDICIAL ARBITRATION & MEDIATION SERVICES, JAMS ARBITRATION PRACTICE, at http://www.jamsadr.com/arb_practice.asp (last visited, Feb. 23, 2002). Arbitration can take on many faces. It allows parties to *custom design* the arbitration rules and procedures to *maximize control over the process.*" *Id.*

101. The NAF claims to be "one of the world's largest neutral administrators of arbitration services," and is composed of legal professionals who arbitrate cases according to the "principle that legal disputes should be decided according to established legal principles." NATIONAL ARBITRATION FORUM, FREQUENTLY ASKED

profit basis,¹⁰² and are thereby susceptible to conflicts of interest when dealing with corporations who frequently use their services and thus ensure their economic livelihood.¹⁰³ The NAF has even gone so far as to use some of its pro-corporate rules as a marketing tool for recruiting corporate business.¹⁰⁴

A final observation of opponents of mandatory consumer arbitration has been the advantage conveyed to corporations by their status as "repeat players" in the process of arbitration.¹⁰⁵ Repeat players are able to learn from "previous transactions and [have] the opportunity to develop a rapport with 'institutional incumbents'" within the arbitral forum.¹⁰⁶ Consumers, on the other hand, are usually unfamiliar with the arbitration process and have no opportunity to gain similar knowledge of the arbitral process or culture.¹⁰⁷ In addition, by using one arbitration service, a corporation can gain institution-specific expertise not available to a consumer.¹⁰⁸ Together, these factors can lead to specific instances of extremely lop-sided pro-corporate outcomes, as evidenced by statistics disclosed in discovery during a lawsuit in 2000 against First USA Bank, which showed that it won 99.6 percent of the 19,705 arbitration disputes it faced in the previous two years.¹⁰⁹

C. *The Unconscionability Argument*

Unconscionability arguments are based on the theory that a contract (or a provision thereof) is unenforceable if (1) one party

QUESTIONS ABOUT THE FORUM, at <http://www.arbitration-forum.com/about/questions.asp#27> (last visited, Feb. 23, 2002). The NAF is compensated by filing fees and hearing fees from the parties filing claims. *Id.*

102. See Harrington, *supra* note 82, at 104.

103. See Harrington, *supra* note 82, at 105 (citing discovery documents in a Texas class action suit against First USA which showed that First USA paid the NAF \$5.3 million between January 1998 and November 1999).

104. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 72 (2000) (noting that the NAF has "marketed its rules to corporations in part with the assurance that its rules do not allow for class actions").

105. See Menkel-Meadow, *supra* note 99, at 38-57.

106. See Harrington, *supra* note 82, at 104.

107. See *id.*

108. See *id.*

109. See Madoff, *supra* note 75, at s14.

possesses a significantly stronger bargaining position and (2) the terms of the contract unfairly oppress the party with the weaker bargaining position.¹¹⁰ Unconscionability challenges to arbitration provisions are most common when there is a contract of adhesion offered by the stronger party on a take-it-or-leave-it basis.¹¹¹ The root theory of unconscionability is that the party with lesser bargaining power is deprived of any meaningful choice in signing the contract.¹¹² The result is a contract that is unenforceable for lack of consent.¹¹³

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court squarely addressed the unconscionability argument in the arbitration context.¹¹⁴ There, the plaintiff filed suit for violation of his rights¹¹⁵ under the Age Discrimination in Employment Act.¹¹⁶ Pursuant to his employment contract, Gilmer was required to settle all disputes through binding arbitration.¹¹⁷ Gilmer challenged the enforceability of the arbitration provision because, inter alia, he was compelled by his employer as a condition of employment to sign the contract containing the provision.¹¹⁸ In holding that Gilmer was bound by the arbitration agreement,¹¹⁹ the Court noted that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable.”¹²⁰ But the use of unconscionability as a means of invalidating arbitration agreements was not foreclosed; rather it was restricted to examination on a case-by-case basis.¹²¹

110. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177-79 (1983).

111. See Bouchard, *supra* note 92, at 330-32.

112. See Madoff, *supra* note 75, at s3.

113. *Id.*

114. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

115. *Id.* at 23.

116. 29 U.S.C. §§ 621-634 (2000).

117. *Gilmer*, 500 U.S. at 23.

118. *Id.* at 33.

119. *Id.* at 35.

120. *Id.* at 33.

121. *Id.* A “claim of unequal bargaining power is best left for resolution in specific cases.” *Id.*

D. *The (Latent) Constitutional Argument*

A final argument remains for invalidating arbitration clauses within consumer agreements: constitutional supremacy.¹²² The Supremacy Clause makes the Constitution superior to any other law.¹²³ The Seventh Amendment to the Constitution guarantees that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."¹²⁴ The Court has found that some constitutional rights can only be waived by the free and deliberate choice of a person who is free of intimidation, deception, or coercion and made aware of the nature of the waived right and the consequence of waiving it.¹²⁵ The presence of a contract of adhesion coupled with the discrepancy in bargaining power giving rise to an unconscionability argument draws into question the purity of the "consent" given by a consumer to waive his constitutional rights.¹²⁶ If the consent does not meet the requirements for waiver, arbitration clauses may be held to violate the constitutional grants under the Seventh Amendment.¹²⁷

122. U.S. CONST. art. VI, § 2; *see also* Smith, *supra* note 75, at 1245 (arguing that Congress may have violated the Supremacy Clause through the adoption of the FAA).

123. U.S. CONST. art. VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

124. U.S. CONST. amend. VII.

125. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In relation to the rights guaranteed by the *Miranda* warnings the court stated:

First, the relinquishment of the [Constitutional] right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Id.

126. Smith, *supra* note 75, at 1245.

127. *Id.*

IV. ANALYSIS

A. *Subsequent Cases Interpreting Green Tree III*

In *Green Tree III*, the Supreme Court left open the possibility that large arbitration costs could preclude a litigant from effectively vindicating her federal statutory rights and thus render an arbitration provision unenforceable, but it held that the record in that case did not show Randolph would bear such costs.¹²⁸ Interestingly, the Court stated, “[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss.”¹²⁹ The Court’s silence on this matter leaves unsettled the standard for evaluating when costs are prohibitive.¹³⁰ Federal courts have since sought to flesh out a workable standard.¹³¹

In *Bradford v. Rockwell Semiconductor Systems, Inc.*,¹³² the Fourth Circuit faced the question of whether a cost-splitting provision requiring an employee to share in the total costs of arbitration rose to the level of prohibitive costs.¹³³ The court interpreted *Green Tree III* as emphasizing two guiding principles: (1) there is a strong federal policy favoring arbitration and (2) determinations of what constitutes a prohibitive cost should be based on the facts of individual cases.¹³⁴ Bradford argued that although he initiated arbitration, his preference was for a judicial forum.¹³⁵ The court noted that in the present case, Bradford offered no evidence that he was unable to pay the fee billed by the AAA,¹³⁶ or that the fee-splitting provision itself deterred him from pursuing his statutory claim.¹³⁷ To the contrary, Bradford initiated

128. *Green Tree III*, 531 U.S. 79, 90 (2000). Randolph argued merely that the *silence* of the provision with respect to costs and fees created the *risk* that she would be required to bear prohibitive arbitration costs. *Id.* (emphasis added).

129. *Id.* at 92.

130. *See id.*

131. *See infra* notes 132-62 and accompanying text.

132. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001).

133. *Id.* at 556-57.

134. *Id.* at 557.

135. *Id.* at 558 n.6.

136. *Id.* at 558 (Bradford was required to pay \$4,470.88 by the AAA pursuant to his arbitration).

137. *Id.* at 558.

the arbitration and conceded that he received a full and fair hearing.¹³⁸ The court instructively said in a footnote that Bradford failed to offer any comparative information as to the cost of litigating his case in a judicial forum,¹³⁹ that he was earning \$115,000 per year in base salary at the time of his discharge,¹⁴⁰ and that it "made sense" that a person claiming a financial burden should raise his objections including a specific forecast of the costs and his burden prior to filing for arbitration.¹⁴¹ Accordingly, the court formally adopted a "case-by-case inquiry" rule and upheld the fee-splitting provision.¹⁴²

Some courts have stated that a mechanism allowing non-payment of costs by indigent claimants, even if this mechanism is not available until after a dispute arises, may defeat an argument for prohibitive costs.¹⁴³ In *Bank One v. Coates*,¹⁴⁴ a Mississippi district court noted that a provision of an arbitration service providing for waiver of costs by indigent defendants, when coupled with a provision that the prevailing party would receive attorney's fees, was sufficient to overcome plaintiff's argument that prohibitive costs denied him access to an arbitral forum.¹⁴⁵ In *Roberson v. Clear Channel Broadcasting, Inc.*,¹⁴⁶ a Florida district court held that the plaintiff's argument of prohibitive costs was defeated because the defendant, both in its motion to compel arbitration and in its reply brief, stipulated that it would pay the plaintiff's costs of arbitration.¹⁴⁷

138. *Bradford, Inc.*, 238 F.3d at 559.

139. *Id.* at 558 n.6.

140. *Id.*

141. *Id.* at 558 n.7.

142. *Id.* at 559; accord *Boyd v. The Town of Hayneville, Alabama*, 144 F. Supp. 2d 1272, 1280 (M.D. Ala. 2001) (adopting the same case-by-case standard and requiring a specific showing of financial costs, comparative data on the cost of litigation, and ability to pay).

143. See *Bank One v. Coates*, 125 F. Supp. 2d 819, 834-35 (S.D. Miss. 2001); see also *Roberson v. Clear Channel Broadcasting, Inc.*, 144 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001) (upholding the arbitration provision). In *Roberson*, the court noted as persuasive that in defendant's motion to compel arbitration and reply brief, defendant stipulated to pay plaintiff's costs. 144 F. Supp. 2d at 1373.

144. *Bank One*, 125 F. Supp. 2d at 834-35.

145. *Id.*

146. *Roberson*, 144 F. Supp. 2d at 1373.

147. *Id.*

The Eleventh Circuit, however, has not been so generous to defendants on this issue.¹⁴⁸ In *Perez v. Globe Airport Security Services, Inc.*,¹⁴⁹ the Eleventh Circuit addressed a similar offer to alleviate costs by the defendant.¹⁵⁰ There, Globe stipulated that it was willing to forgo use of the AAA, as required in the original agreement, in favor of less expensive, private arbitration.¹⁵¹ The court rejected this argument and found that Globe's proposal constituted an offer to modify the original agreement.¹⁵² Therefore, Perez's rejection of Globe's offer to modify left the original contract intact.¹⁵³ Ultimately, the court held the arbitration agreement was unenforceable because, although Globe had previously agreed to abide by AAA rules, it included a cost-splitting provision in the agreement that contradicted the AAA rules allowing the arbitrator to award fees and costs at his discretion.¹⁵⁴

B. *The Emerging Standard*

On the basis of the treatment of *Green Tree III* by subsequent courts, three principles emerge. First, the courts appear committed to resolving the issue of whether there are prohibitive cost on a case-by-case basis.¹⁵⁵ Second, while utilizing this case-by-case review, courts seem to require the plaintiff to make a showing of specific costs that will be incurred in the arbitral forum, comparative costs of pursuing the claim in a judicial forum, and evidence of the plaintiff's ability to pay.¹⁵⁶ Third,

148. *Perez v. Globe Airport Security Servs., Inc.*, 253 F.3d 1280 (11th Cir. 2001).

149. *Id.*

150. *Id.* at 1284-85.

151. *Id.* at 1284-85 n.2.

152. *Id.*

153. *Id.*

154. *Perez v. Globe Airport Security Servs., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001).

155. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 559 (4th Cir. 2001) (adopting the same case-by-case standard and requiring a specific showing of financial costs, comparative data on the cost of litigation, and ability to pay); *accord Perez*, 253 F.3d at 1284-85; *Boyd v. The Town of Hayneville, Alabama*, 144 F. Supp. 2d 1272, 1280 (M.D. Ala. 2001); *Bank One v. Coates*, 125 F. Supp. 2d 819, 834-35 (S.D. Miss. 2001); *Roberson v. Clear Channel Broadcasting, Inc.*, 144 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001).

156. *See Bradford*, 238 F.3d at 559; *accord Perez*, 253 F.3d at 1284-85; *Boyd*, 144 F.

courts prefer that a plaintiff present evidence of prohibitive costs before contesting arbitration.¹⁵⁷

A final, and still evolving, issue concerns the effect of post-dispute offers by the defendant to reduce or eliminate the plaintiff's fees and costs.¹⁵⁸ Some courts have held that these provisions effectively preclude a plaintiff from advancing a prohibitive costs argument.¹⁵⁹ The Eleventh Circuit, however, has found that these provisions constitute an offer to modify the contract, which may be rejected by the plaintiff.¹⁶⁰ Once the plaintiff rejects the offer, he may then proceed with his prohibitive cost argument.¹⁶¹ It appears that most courts will not invalidate an arbitration provision for reason of prohibitive costs if at the time of signing the agreement there exists an allowance for waiver of costs for indigent plaintiffs, or if the defendant includes a provision prior to signing that it will pay part or all of the plaintiff's arbitration costs.¹⁶²

V. IMPLICATIONS AND RECOMMENDATIONS

In 1997, many financial lender institutions had already begun to include arbitration clauses in their consumer contracts due to the pro-lender decisions rendered in federal and state court.¹⁶³ Four years later the trend seems to have continued.¹⁶⁴

Supp. 2d at 1280; *Bank One*, 125 F. Supp. 2d at 834-35; *Roberson*, 144 F. Supp. 2d at 1373.

157. *Bank One*, 125 F. Supp. 2d at 834-35 (noting that since plaintiff brought the arbitration dispute, this evidenced an ability to pay).

158. Compare *Perez*, 253 F.3d at 1284-85 (not allowing post-agreement change to affect the determination of whether costs prohibitive) with *Roberson*, 144 F. Supp. 2d at 1373 (upholding the arbitration provision and noting as persuasive that in defendant's motion to compel arbitration and reply brief, defendant stipulated to pay plaintiff's costs).

159. *Roberson*, 144 F. Supp. 2d at 1373.

160. *Id.* (noting that defendant stipulated to pay the plaintiff's costs and holding that costs were therefore not prohibitive to plaintiff).

161. *Perez*, 253 F.3d at 1284-85 n.2.

162. See *Bank One*, 125 F. Supp. 2d at 834-35 (rule allowing for waiver of costs by indigent defendants was a factor in determining that costs were not prohibitive of plaintiff's access to an arbitral forum).

163. See Alan S. Kaplinsky and Mark J. Levin, *Consumer Financial Services Arbitration: Current Trends And Developments*, 53 BUS. LAW. 1075, 1075-76 (1998).

164. See Harrington, *supra* note 82, at 101-07 (discussing judicial decisions on consumer arbitration clauses that have continued on a pro-corporate trend, and more

Today, corporations like American Express, Discover, MBNA America Bank, and Bank One have all added retroactively effective arbitration clauses to their credit card agreements.¹⁶⁵ The startling rapidity with which consumer loan corporations have included retroactive arbitration provisions in their credit card contracts has drawn the interest of law professors, employees of the AAA, and consumer lender legal counsels.¹⁶⁶ With the increasing commonality of arbitration clauses in the financial contracts, an analysis of the impact of the *Green Tree III* decision on the validity of such arbitration clauses appears ripe for consideration by financial institutions.¹⁶⁷

A. *Safe Features of an Arbitration Provision*

A commercial entity seems unlikely to face a per se ban on cost-splitting clauses in an arbitration provision.¹⁶⁸ In *Bradford*, the cost-splitting provision which the court upheld stated, “[t]o ensure that the Arbitrator is not biased in any way in favor of one party because that party is paying all or most of the Arbitration fees and costs, *the parties shall share equally the fees and costs of the Arbitrator.*”¹⁶⁹ Since the emphasis by the *Green Tree III* Court was pointed squarely at whether the particular would-be litigant

and more financial corporations that have responded by including arbitration clauses in their contracts).

165. See Harrington, *supra* note 82, at 102; see also Jess Bravin, *Banks Seek to Halt Suits by Cardholders*, WALL ST. J., May 2, 2001, at B1.

166. Jess Bravin, *Banks Seek to Halt Suits by Cardholders*, WALL ST. J., May 2, 2001, at B1.

167. *Id.*

168. See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557 (4th 2001) (fee-splitting provision reckoned to be similar to the “silence” of cost allocation in *Green Tree III*, therefore no per-se prohibition will apply). But see *supra* notes 148-54 and accompanying text (discussing the danger that cost-splitting provisions may conflict with a co-operating clause requiring the parties to abide by all rules of the arbitration service, thus the cost-splitting provision can render the entire arbitration clause unenforceable).

169. *Bradford*, 238 F.3d at 551 (emphasis in original). A curious person might question the sincerity of Rockwell’s proclamation that its motivation behind including this clause was solely the protection of arbitrator neutrality. The argument that arbitrators are biased in favor of the commercial litigant is based not upon who pays the arbitrator, but who selects the arbitration service for bulk arbitration contracts. See Harrington, *supra* note 82, at 105 (citing discovery in a Texas class action suit against First USA that showed First USA paid the NAF \$5.3 million between January 1998 and November 1999).

could actually afford to pay for arbitration,¹⁷⁰ it seems unlikely that cost-splitting provisions will be proscribed across-the-board.¹⁷¹ The guiding principle of *Green Tree III* is that in order for an arbitration clause to be held unenforceable, regardless of how costs are allocated between the parties, those specific costs must *actually* be prohibitive for *the* plaintiff, not *speculatively* prohibitive for *any* plaintiff.¹⁷²

Courts have further enforced the principle that cost must be individually and actually prohibitive by holding enforceable clauses which require the losing party to pay all of the attorney's fees incurred in the arbitration contest.¹⁷³ In *Bank One*, the plaintiff failed to give notice of his refusal to accept the new arbitration provision to Bank One, and was therefore deemed bound by the terms of the provision.¹⁷⁴ The new provision stated that the arbitration proceeding would be bound by the code of procedure of the NAF, but did not disclose what those procedures entailed.¹⁷⁵ The plaintiff later discovered that the NAF procedures included a rule allowing the prevailing party to recover its attorney's fees.¹⁷⁶ The court found that the *Green Tree III* principle of individualized determination compelled it to hold that a fee-shifting provision did not render the clause unenforceable.¹⁷⁷

B. *Dangerous Features of an Arbitration Provision*

Critical to the defendant's success in *Bank One* was a clause allowing waiver of attorney's fees and arbitration costs for indigent parties.¹⁷⁸ Similar clauses have been cited by other courts as an important factor when considering whether a cost allocation

170. *Green Tree III*, 531 U.S. 79, 92 (2000).

171. *Bradford*, 238 F.3d at 557.

172. *Id.* In noting the rationale of *Green Tree III*, the Fourth Circuit here emphasized that the speculative possibility of prohibitive costs was irrelevant. *Id.* It is costs actually prohibitive that are of concern to the court. *Id.*

173. *Bank One v. Coates*, 125 F. Supp. 2d 819, 835 (S.D. Miss. 2001).

174. *Id.* at 826.

175. *Id.*

176. *Id.* at 835.

177. *Id.* (holding a fee-shifting provision, without evidence that an individual plaintiff will incur prohibitive costs, is insufficient to invalidate an arbitration clause).

178. *Id.*

scheme prohibited access to the arbitral forum.¹⁷⁹ Given the *Green Tree III* Court's emphasis on individualized determinations of ability to pay in evaluating whether arbitration costs are prohibitive,¹⁸⁰ a provision relieving an indigent plaintiff of costs upon a showing of indigence would appear to weigh favorably for a commercial litigant.¹⁸¹ Therefore, a clause allowing for waiver of filing fees and arbitration costs, and nullification of any fee allocation provision for an indigent plaintiff is likely to strengthen the enforceability of an arbitration provision.¹⁸² The absence of such a provision could render an arbitration provision unenforceable.¹⁸³

C. *Legislative Re-Tooling of the FAA is Looming*

Some Congressmen have recently expressed concern that arbitration provisions in consumer contracts entered into before an actual dispute arises have eroded the rights of consumers.¹⁸⁴ Sponsors of the "Consumer Credit Fair Dispute Resolution Act"¹⁸⁵ were particularly troubled by the practice of credit card companies and consumer credit lenders of inserting mandatory binding arbitration clauses in their consumer agreements without consumers' knowledge or consent.¹⁸⁶ The Act was intended to amend the FAA by inserting pro-consumer language that would prohibit arbitration of a consumer credit contract unless the

179. See *Roberson*, 144 F. Supp. 2d at 1373 (S.D. Fla. 2001) (citing defendant's willingness to pay the arbitration costs of the would-be litigant as influential in its holding that the plaintiff was not denied access to the arbitral forum); *Perez*, 253 F.3d at 1284-85 (11th Cir. 2001) (noting in dicta that the defendant's offer to pay the plaintiff's arbitration costs was relevant to determining whether the costs were prohibitive of the plaintiff's vindication of rights). Note that these cases are addressing the impact of indigent plaintiff exception clauses on whether individual plaintiffs would face prohibitive costs, not whether the cost-allocation provisions are per se invalid.

180. *Green Tree III*, 531 U.S. 79, 92 (2000).

181. See *Roberson*, 144 F. Supp. 2d at 1373; *Perez*, 253 F.3d at 1284-85.

182. *Perez*, 253 F.3d at 1284-85.

183. *Id.*

184. See Madoff, *supra* note 75, at s3. On January 25, 2001, United States Senators Russ Feingold (D-Wis) and Patrick Leahy (D-Vt) initiated legislation to amend the FAA. *Id.*

185. S. 192, 107th Cong. (1st Sess. 2001) (tabled).

186. Madoff, *supra* note 75, at s3.

arbitration agreement was entered into after the dispute arose.¹⁸⁷ A similar bill was introduced in the House of Representatives in 1999, which would have prohibited pre-dispute mandatory arbitration between commercial entities and consumers.¹⁸⁸ However, neither the Senate nor the House voted on these proposals.

VI. CONCLUSION

Although the value, purpose, and fairness of arbitration are debated,¹⁸⁹ the Supreme Court signaled in *Green Tree III* that contractual arbitration provisions are here to stay.¹⁹⁰ If a consumer signs an arbitration provision, the provision is enforceable, unless the consumer demonstrates that he is (not merely that he might be) precluded from the arbitral forum by arbitration fees.¹⁹¹ Subsequent courts have rigorously upheld this process of individualized evaluation.¹⁹² Absent such individualized showing by a consumer, the arbitration provision will be held enforceable.¹⁹³

Despite what appears to be a strongly pro-commercial decision by the Supreme Court, commercial entities must not take

187. S. 192, 107th Cong. (1st Sess. 2001) (tabled). The relevant portion of the amendment would be inserted after the introduction of 9 U.S.C. section 2, and would read:

Notwithstanding the preceding sentence, a written provision in any consumer credit contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of the contract, or the refusal to perform the whole or any part thereof, shall not be valid or enforceable.

Nothing in this section shall prohibit the enforcement of any written agreement to settle by arbitration a controversy arising out of a consumer credit contract, if such written agreement has been entered into by the parties to the consumer credit contract after the controversy has arisen.

Id.

188. H.R. 2258, 106th Cong. (1999) (introduced by Luis Guitierrez, D-Ill).

189. *See supra* notes 81-127 and accompanying text.

190. *See supra* notes 46-66 and accompanying text.

191. *See supra* notes 55-58 and accompanying text.

192. *See supra* notes 132-54 and accompanying text.

193. *See supra* notes 132-47 and accompanying text.

the Court's decision as license to abuse consumers.¹⁹⁴ Arbitration provisions may yet be held unenforceable on an individualized showing of prohibitive costs.¹⁹⁵ A clause shifting fees to the losing party, or splitting arbitration fees between parties regardless of the case outcome will not encounter a per se prohibition because the determination is made case-by-case.¹⁹⁶ But it seems unwise to leave out provisions allowing indigent plaintiffs to waive arbitration fees.¹⁹⁷

The Court has significantly expanded the ability of corporations to impose upon consumers the requirement that all disputes be litigated in a private, corporate-funded arbitration hearing, but consumer abuse will not be tolerated.¹⁹⁸ The present Court has reserved the opportunity to hold unenforceable arbitration provisions that cross the line.¹⁹⁹ A future Court may be one vote away from finding unconstitutional arbitration provisions that fail to give consumers sufficient notice and opportunity to reject the provision.²⁰⁰

JASON BRADLEY KAY

194. *See supra* notes 178-83 and accompanying text.

195. *See supra* notes 181-83 and accompanying text.

196. *See supra* notes 168-77 and accompanying text.

197. *See supra* notes 178-83 and accompanying text.

198. *See supra* notes 46-71 and accompanying text.

199. *See supra* note 60 and accompanying text.

200. *See supra* notes 67-71 and accompanying text.